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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 171

MARY BELL KING, PETITIONER,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

versus

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

Appendix

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law of the District Court, omitting the caption, follow:

In compliance with Rule 52 (a) of the Rules of Civil Procedure, I find the facts specially, and state my conclusions of law thereon, in the above cause, as follows:

FINDINGS OF FACT

I

The parties to the action stipulate and agree as follows:

"1. This stipulation sets forth all relevant facts upon which the issue involved herein is submitted to the Court for decision and judgment.

"2. Plaintiff is a resident of Spartanburg, South Carolina.

"3. The defendant is a Fraternal Benefit Association organized and maintained for the purpose, among other things, to 'establish funds to indemnify its members for disability or death resulting from accidental means'; incorporated under the laws of the State of Ohio, and licensed to do business as a fraternal benefit association in the State of South Carolina.

"4. On September 20, 1938, the defendant issued the deceased Drew Lagrone King, Certificate No. 276431-R hereto attached as Exhibit 'A' thereby certifying that he had been accepted as an insured member of said Order under Class 'A'. Said Certificate further provided that it, together with the application for insurance, constitution and by-laws and certain other papers not involved in this litigation, should constitute the contract between the parties. This contract was in force on February 9, 1943. The [fol. 2] papers and documents referred to in this paragraph may be handed to the Court by either party during the course of the trial.

"5. The portions of the defendant's constitution and by-laws relevant to this action are:

"(a) Article 15, Section 13, providing the indemnity of $5,000.00 in the event of death effected solely through external violent and accidental means.

"It is conceded that the deceased elected Option 2 with reference to the mode of settlement providing that the entire indemnity should be paid within ninety days from the receipt by the Supreme Executive Committee of satisfactory final proof of death. The plaintiff herein was the duly designated beneficiary, and if entitled to recover against the defendant, the amount of such recovery should be $5,000.00, with interest at six per cent (6%) from the twenty-fifth day of August, 1943, and costs.

"(b) Article 15, Section 16, which provides 'this Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule * * *).'

"6. On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor with

[fol. 3] Lieutenant K. C. Bates as Observer. All of the above parties were members of the Civil Air Patrol.

"About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

"At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive.

"The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight stratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis as shown in the proof of death furnished by plaintiff to defendant, was 'Drowning as a result of exposure in the water after [fol. 4] failure of airplane motor'. Lt. Com. Brown was not an eye witness to events leading to the death of King.

"7. Final proofs of death were duly submitted to the defendant on May 25, 1943.

"8. The single issue presented by this case is whether or not the deceased's death fell within the exemption provided in the contract of insurance which reads as follows: 'This Order shall not be liable to any person for any

benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics, (except as a fare-paying-passenger in a licensed aircraft operated on a regular schedule)', it being conceded that in making the trip from the base field at James Island on February 9, 1943, he was a not a fare-paying passenger on a licensed aircraft operated on a regular schedule."

II

Plaintiff's counsel have handed to me the application for insurance, the certificate of insurance, and the constitution and by-laws of the defendant in accordance with the agreement in the foregoing stipulation. The application for membership in, and to be insured, by the defendant insurance company, together with a deposit of the requisite fee and premium therefor, was made by Drew L. King in this State to Spartan Council, No. 323 of Spartanburg, South Carolina, upon which application the defendant delivered to him its insurance Certificate No. 276431-R at Spartanburg, South Carolina.

Conclusions of Law

I

The contract of insurance in this controversy is a South Carolina contract, and it must be governed, solved and construed by laws of this State.

[fol. 5]

II

The proximate cause of the death of Lieutenant King was accidental drowning within the terms of the policy of insurance; his death did not result from participation as a passenger or otherwise in aviation or aeronautics within the meaning of the exclusion provisions of the policy.

III

Plaintiff is entitled to judgment against defendant in the sum of Five Thousand Dollars ($5,000.00), with interest at six per cent from the 25th day of August, 1943, together with the costs of this action.

Entry of appropriate judgment is directed accordingly.

C. C. Wyche, United States District Judge.

Dated: Spartanburg, South Carolina, May 24, 1946.

OPINION OF THE DISTRICT COURT

The opinion of the District Court, omitting the caption, follows:

The defendant in this action is a Fraternal Benefit Association. The plaintiff, as beneficiary of a certificate of membership insurance, issued by the defendant on the life of her husband, Drew L. King, seeks to recover the sum of Five Thousand Dollars ($5,000.00), from the defendant upon its insurance contract, which provided that it would pay to the beneficiary the sum of Five Thousand Dollars ($5,000.00), upon receipt of due proof of the death of the [fol. 6] insured effected solely through external, violent and accidental means.

The facts have been stipulated by the parties, and, are as follows:

"1. • • •

"2. Plaintiff is a resident of Spartanburg, South Carolina.

"3. The defendant is a Fraternal Benefit Association organized and maintained for the purpose, among other things to 'establish funds to indemnify its members for disability or death resulting from accidental means'; incorporated under the laws of the State of Ohio, and licensed to do business as a Fraternal Benefit Association in the State of South Carolina.

"4. On September 20, 1938, the defendant issued the deceased Drew Lagrone King, Certificate No. 276431-R hereto attached as Exhibit 'A' thereby certifying that he had been accepted as an insured member of said Order under Class 'A'. Said Certificate further provided that it, together with the application for insurance, constitution and by-laws and certain other papers not involved in this litigation, should constitute the contract between the parties. This contract was in force on February 9, 1943. The papers and documents referred to in this paragraph may be handed to the Court by either party during the course of the trial.

"5. The portions of the defendant's constitution and by-laws relevant to this action are:

"(a) Article 15, Section 13, providing the indemnity of $5,000.00 in the event of death effected solely through external violent and accidental means.

"It is conceded that the deceased elected Option 2 with reference to the mode of settlement providing that the entire indemnity should be paid within ninety days from [fol. 7] the receipt by the Supreme Executive Committee of satisfactory final proof of death. The plaintiff herein was the duly designated beneficiary, and if entitled to recover against the defendant, the amount of such recovery should be $5,000.00, with interest at six per cent (6%) from the twenty-fifth day of August, 1943, and costs.

"(b) Article 15, Section 16, which provides 'this Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule * * *).

"6. On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor with Lieutenant K. C. Bates as Observer. All of the above parties were members of the Civil Air Patrol.

"About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

"At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them [fol. 8] at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for

a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive.

"The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. Their bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis as shown in the proof of death furnished by plaintiff to defendant, was 'Drowning as a result of exposure in the water after failure of airplane motor.' Lt. Com. Brown was not an eye witness to events leading to the death of King.

"7. Final proofs of death were duly submitted to the defendant on May 25, 1943.

"8. *The single issue presented by this case is whether or not the deceased's death fell within the exemption provided in the contract of insurance which reads as follows: 'This Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics,* (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule)', it being conceded that in making the trip from the base field at James Island on February 9, 1943, [fol. 9] he was not a fare-paying passenger on a licensed aircraft operated on a regular schedule."

The application for membership in, and to be insured by, the defendant insurance company, together with a deposit of the requisite fee and premium therefor, was made by Drew L. King in this State to Spartan Council, No. 323 of Spartanburg, South Carolina, upon which application the defendant delivered to him its insurance certificate at Spartanburg, South Carolina.

Under such facts, (as well as under State statutes)[1]

[1] "Condition Precedent to Doing Business in This State.—It shall be a further condition precedent to the right of any such corporation to do business in this State, that it shall be taken and deemed to be the fact irrebuttable, and part and

the insurance certificate involved in this controversy is a South Carolina contract, governed and solvable by the laws of this State. *Owen* v. *Insurance Co.*, 84 S. C. 253, 256; *Cantey, Adm'r* v. *Phila. Life Ins. Co.*, 166 S. C. 181, 188; *Fountain & Herrington* v. *Mutual Life Ins. Co.*, (CCA 4), 55 F. 2d 120.

[fol. 10] It has been decided in South Carolina, that cause of death, within the meaning of insurance against death resulting from external, violent and accidental means, is the immediate cause, and not the remote cause. *Goethe* v. *New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451. In that case, Goethe died of a heatstroke, following vigorous efforts to put out a fire. On the issue of whether death was the culmination of angina pectoris, a disease, or heatstroke, an accident, the Supreme Court of South Carolina said: "In our opinion, the heatstroke suffered by the insured in the case at bar was in and of itself an accidental means, • • •."

The South Carolina Supreme Court has also adopted the rule, as to exclusion clauses in accident insurance policies, that liability is to be determined by the cause of death, and not by circumstances or status of the insured.

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parcel of all contracts entered into between such corporation and a citizen or corporation of this State, that the taking or receiving, from any citizen or corporation of this State, of any charge, fee, payment, toll, impost, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State, anything contained in such contract, or any rules or by-laws of such corporation to the contrary notwithstanding." *Code of Laws of South Carolina*, 1942, § 7773.

"Corporations Doing Business in This State Deemed Doing Business Under This Chapter.—All such corporations hereafter doing business in this State, as defined in this chapter, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this chapter, and that such terms and conditions shall be deemed and taken in all the courts of this State to be a part and parcel of all contracts hereafter entered into be-

Young v. *Life & Casualty Insurance Co.*, 204 S. C. 386, 29 S. E. (2d) 482. In sustaining recovery for death of a soldier in an automobile accident while on furlough, even though the exclusion clause of the policy excluded liability "* * * if death results from bodily injuries sustained while participating in aviation or aeronautics as a passenger or otherwise, or *while* the insured is in military or naval service in time of war", (emphasis added) the Court in this case said: "We have denied the status theory in previous cases involving insurance clauses. In *McGee* v. *Globe Indemnity Co.*, 173 S. C. 380, 175 S. E. 849, it was held that a provision in a policy indemnifying the owner of an automobile against loss or damage to his car, which should not apply while the car was used by any person in violation of law as to age, or by any person under the age of 16 years, did not relieve the insurer of liability for an accident, although the operator of the car at the time was under 16 years of age. The Court held that in addition it must be shown that a causal connection existed between [fol. 11] the age of the driver and the accident. In the McGee case, *supra*, the insurer specifically raised the question of status or condition. The Court stated with reference to this contention: 'We are of the opinion that the distinction advanced between the excluded act and condition is without any logical basis. * * *'. The rule established by the

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tween such corporations and a citizen or corporation of this State, anything contained in any such contract or in any rules or by-laws of such corporation to the contrary notwithstanding." *Code of Laws of South Carolina*, 1942, § 774.

"Subject to Laws-Limitations.—All and every such foreign corporation carrying on business or owning property in this State shall be subject to the laws of the same in like manner as corporations chartered under the laws of this State, but nothing herein contained shall be construed to permit any such foreign corporation to exercise any franchise or enjoy any privilege or immunity other than the right to own property and carry on business in like manner as individuals, natural born citizens of such State of the United States or of foreign countries, might do, and subject to the terms and conditions of this chapter." *Code of Laws of South Carolina*, 1942, § 7776.

Reynolds case (Reynolds v. Life & Casualty Ins. Co., 166 S. C., 214, 164 S. E., 602), is obviously founded upon the reasonable view that when the parties made the contract of insurance, they were not inserting a mere arbitrary provision but that it was the purpose of the insurance company to relieve itself of liability from accidents caused by the excluded condition."[2] See also, *Bailey* v. *United States Fidelity & Guaranty Co.*, 185 S. C. 169, 171, 193 S. E. 638.

In the construction of insurance contracts it must be remembered that the courts should not ignore the fact that the primary object of all insurance is to insure and that, in cases of doubt, uncertainty, manifest ambiguity; or susceptibility of two equally reasonable interpretations, since the language used is the selection and arrangement of the insurer, such contracts must be liberally construed in favor of the insured. *Parker* v. *Jefferson Standard Life Ins. Co.*, 158 S. C. 394, 397, 155 S. E. 617. Insurance policies are drawn by the legal advisers of the insurance company who study with care the decisions of the courts, and, with such decisions in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurance company. *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, (CCA 6) 58 Fed. 945, 956.

[fol. 12] While, as stated before, I must be guided, in construing the insurance contract, by the law of South Carolina, I think it should be observed that the rules of construction of accident insurance policies, the principles of law declared, and the conclusions reached by the South Carolina Supreme Court in the foregoing decisions of *Goethe* v. *New York Life Ins. Co., supra; Young* v. *Life & Casualty Insurance Co., supra; McGee* v. *Globe Indemnity Co., supra; Reynolds* v. *Life & Casualty Ins. Co., supra; Bailey* v. *United States Fidelity & Guaranty Co., supra; Parker* v.

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[2] It is true that the Circuit Court of Appeals for the Fourth Circuit in the case of *Myers v. Ocean Accident & Guarantee Corporation*, 99 F. 2d 485, observed that the weight of authority was against the principle laid down in this case, but in that case the court was not governed by the South Carolina decisions. Here, I must be governed by the South Carolina law, as declared by the South Carolina Supreme Court in construing the insurance contract.

Jefferson Standard Life Ins. Co., supra, find respectable and weighty support in the clear reasoning of Circuit Judge Taft, later Chief Justice of the Supreme Court, in the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of *Manufacturers' Accident Indemnity Co.* v. *Dorgan, supra*, and in the logic of the opinion of Circuit Judge Minton in the decision of the Circuit Court of Appeals of the Seventh Circuit in the case of *Bull* v. *Sun Life Assurance Co.*, 141 F. 2d 456, cert. den. 323 U. S. 723, as well as in Lord Bacon's maxim, quoted with approval by the Tenth Circuit Court of Appeals in the case of *Aetna Life Ins. Co., Hartford, Conn.* v. *Conway*, 102 F. 2d 743.[3]

In the *Dorgan Case*, the deceased, (husband of the plaintiff in that case) was last seen alive fishing in a brook. Twenty minutes later, he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The defendant insurance company contended, and evidence was introduced by it tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The jury found adversely [fol. 13] to defendant's contention, and rendered a verdict for the plaintiff. In affirming the judgment of the District Court, Judge Taft said: "The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to any bodily injury happening directly or indirectly, in

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[3] The defendant relied upon the cases of *Neel v. Mutual Life Ins. Co. of New York*, (CCA 2) 131 F. 2d 159, and *Green v. Mutual Ben. Life Ins. Co.*, (CCA 1) 144 F. 2d 55, but the opinions in these cases are not in conformity with the decisions of the South Carolina Supreme Court, and are contrary to the reasoning of the court in the *Dorgan* and *Bull Cases*. Furthermore, the facts in these cases, relied upon by the defendant, are distinguishable from the facts in the case now under consideration.

consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death.'

"It is well settled that an involuntary death by drowning is a death of external, violent, and accidental means. *Trew v. Assurance Company*, 6 Hurl. & N. 838; *Winspear v. Insurance Co.*, 6 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

"We are of the opinion that in the legal sense, and within the meaning of the last clause, *if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death unless it appeared that death would have been the result, even had there been no water at hand to fall into.* The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.

"In *Winspear v. Insurance Co.*, 6 Q. B. Div. 42, the terms of the policy provided 'that it should cover any personal injury caused by accidental, external, and visible [fol. 14] means, if the direct effect of such injury should occasion his death; and it provided, further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease.' The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.

"In *Lawrence v. Insurance Co.*, 7 Q. B. Div. 216, the policy provided:

"'This policy covers injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, * * * or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly, or jointly with such accidental injury.'

"The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the

railway when an engine and carriages which were passing went over his body, and killed him. It was held that 'the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable.'

"Mr. Justice Watkin Williams said in this case: 'The true meaning of this proviso is that, if the death arose from a fit, the company is not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company is [fol. 15] exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation.'

"After giving some illustrations, the learned justice continued: 'I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to be wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.'

"These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the supreme court in case of *Insurance Co. v. Crandal*, 120 U. S. 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability of death.

"We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any disease, such accidental death could be said, within the meaning of the policy, to have been 'caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease.' In our opinion the adjective 'accidental' qualifies not only 'injuries,' but also 'death,' and therefore an accidental death by drowning does result from, and is caused indirectly by, fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease. The excep-

tion is broader than the exceptions in the policies considered in the Winpsear and Lawrence Cases, and is made so by the use of the word 'indirectly.' As can be seen from the words of Mr. Justice Williams quoted above in the Lawrence Case, if that policy had provided that it should not apply to an accident to which a fit contributed [fol. 16] indirectly, the company would not, in his opinion, have been liable." (Emphasis added)

In the recent case of *Bull* v. *Sun Life Assurance Co., supra*, there was for construction by the Court an exclusion clause, more favorable to the insurer than is the exclusion clause in the case here under consideration. The exclusion clause in the *Bull Case* was, "Death as a result, directly or *indirectly*, of service, travel, or flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed under this policy." (Emphasis added.)

The facts in the *Bull Case* disclose that: "On February 5, 1942, Richard Bull, who was then a Lieutenant (j. g.) in the United States Naval Reserve, was commanding officer and alternate pilot of a seaplane which was engaging in routine patrol duty in the South Pacific. Coming across some Japanese ships at anchor in a small harbor, Lieutenant Bull and his crew commenced bombing them, but anti-aircraft fire and Japanese Zeroes peppered their plane. The port motor was shot out, gasoline poured into the hull filling the plane with fumes, and ten or fifteen miles from the scene of the encounter they were forced to make a landing on the water, 500 to 1,000 yards off the island of Amboina, Dutch East Indies. The plane did not crash, but after landing it could not have flown again without repairs. The motors were immediately cut off and for ten minutes the plane was afloat with its anchor overboard. Gasoline was still escaping from the gas tanks into the hull of the plane and spreading upon the surrounding water so that the whole area was in an explosive condition.

"Two of the plane's crew, Hargrave and Nelson, with a wounded comrade, debarked from the plane in a rubber boat. Hargrave testified by deposition that Lieutenant Bull was inside the plane the last time that he saw him. Nelson testified by deposition that the last time he saw him, he was outside the plane on the fuselage, trying to [fol. 17] launch a rubber boat. While Lieutenant Bull was in that position, attempting to escape from the immobile,

disabled plane, a Japanese seaplane dived to within thirty to fifty feet of the crippled plane, strafing it and the water around it. According to Nelson, Lieutenant Bull was exposed to this machine gun fire. To protect themselves, Nelson and Hargrave abandoned their life raft and dived into the water. The first strafing not having sunk the disabled plane, the enemy plane circled and returned for a second attack. While the witnesses were under the water, they heard an explosion, and when they emerged, the area where the plane had been was in flames, with only the tip of a wing still visible. Lieutenant Bull was never seen thereafter. Whether he was on the fuselage at the time of the second strafing does not appear."

Among other things, Judge Minton, in his opinion affirming the judgment for the insured, said: "The question presented to us is whether Lieutenant Bull met his death 'as a result, directly or indirectly, of service, travel, or flight' in that seaplane. This is a legal question that requires us to construe the contract of insurance. It is elementary that such contracts are strictly construed against the insurance company. Unless the clear and reasonable construction of this contract supports the contention of the defendant, we must affirm the District Court.

* * *

"It is the defendant's contention that Lieutenant Bull's death was the indirect result of service, travel, or flight in that patrolling seaplane. Let us consider the case from this view. The seaplane had landed and was so disabled that it would never fly again without repairs. It was anchored, and the engines had been stopped for nearly ten minutes. Service, travel, and flight in that plane had come to an end. Lieutenant Bull, as the evidence showed, was out upon the fuselage trying to inflate a rubber boat for [fol. 18] the purpose of escape. While he was in that position, the jury had a right to infer, a Japanese plane shot him and from those bullet wounds he died. Was his death a result of aviation or of war? What connection, direct or indirect, did his death have with that disabled aircraft which lay in the water, useful only as a raft? *The sole connection was that Lieutenant Bull arrived at this place by way of aircraft. But he was not injured in the arrival. He was not injured by service, travel, or flight in the aircraft. He was killed after those things had terminated.* * * *

"We hold that disengagement from service, travel, and

flight in that seaplane had taken place in the case at bar, and that Lieutenant Bull's death had no connection, directly or indirectly, with service, travel, or flight in that seaplane within the meaning of the policy. Where the service travel, and flight in the aircraft had definitely ended, and the only connection the insured had with the plane at the time he met his death at the hands of a strafing Jap was that he had arrived by plane at the place where the Jap shot him, his death was too remote to be considered the result, direct or indirect, of service, travel, or flight in an aircraft. * * * (Emphasis added.)

The Circuit Court of Appeals of the Tenth Circuit in the case of *Aetna Life Ins. Co., Hartford, Conn.* v. *Conway*, 102 F. 2d 743, quotes with approval the following from the decision in the case of *Meyer* v. *Fidelity & Casualty Co. of New York*, 96 Iowa 378, 65 N. W. 328, 330, 59 Am. St. Rep. 374: "It seems to be a well-settled rule in insurance law to attribute an injury or loss to its proximate cause only; and, if this be true, the disorder, whatever it may have been, was but a condition, the fall being the sole and proximate cause of the injury. Lord Bacon's maxim that 'it were infinite for the law to judge the cause of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and [fol. 19] judgeth of acts by that, without looking to any farther degree,'—seems to apply to this character of cases." (Citing *Manufacturers' Accident Ins. Co.* v. *Dorgan*, 6 Cir., 58 F. 945, 22 L. R. A. 620.)

In the instant case, Lieutenant King arrived by way of aircraft at the place near where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there. He left the plane uninjured and wearing an inflated life jacket. The plane had not crashed, but had landed on the water in a normal landing attitude and sank within a few minutes after its landing. Service, travel, flight and participation in aviation or aeronautics in that plane had come to an end without injury to Lieutenant King. At the time the plane sank, King was alive and uninjured and had the protection of an inflated life jacket which he was wearing. He was known to have been alive for a period of, at least, two to two and one-half hours thereafter. Lieutenant Taylor, piloting another plane, had kept King in sight

for two or two and one-half hours, when a shortage of gasoline in his plane forced him to return to his base.

To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant insurance company when its policy was issued to Lieutenant King. I find that disengagement from participation in aviation or aeronautics had taken place, and under the facts, and applicable law in this case, it cannot be said that Lieutenant King's death resulted from participation, as a passenger or otherwise, in aviation or aeronautics. Where the service, travel and flight in the aircraft had definitely ended, and the only connection the insured had with the plane at the time he met his death by drowning, was that he had arrived by plane at a place near where he was drowned, his death was too remote to be considered *the result* of participation in aviation or [fol. 20] aeronautics. *Bull v. Sun Life Assurance Co., supra.*

I must, therefore, conclude that the proximate cause of the death of Lieutenant King was accidental drowning, within the terms of the policy;[*] and that his death did not result from participation as a passenger or otherwise in aviation or aeronautics, within the meaning of the exclusion provisions of the policy, and consequently the plaintiff is entitled to recover from the defendant the sum of Five Thousand Dollars ($5,000.00), with interest at six per cent (6%), from the 25th day of August, 1943.

Counsel may submit an appropriate order accordingly.

(S.) C. C. Wyche, United States District Judge.

Dated at Spartanburg, South Carolina, May 24, 1946.

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[*] It is well settled that an involuntary death by drowning is a death by external, violent and accidental means. *Cooley's Briefs on Insurance*, 2d Ed., Vol. 6, page 5254; *De Van v. Commercial Travelers' Mut. Acc. Ass'n. of America*, 51 N. E. 1090, 157 N. Y. 690; *U. S. Mut. Acc. Ass'n. v. Hubbell*, 47 N. E. 544, 56 Ohio St. 516, 40 L. R. A. 453; *Anderson v. Inter-State Business Men's Accident Ass'n. of Des Moines, Iowa*, 188 N. E. 844, 354 Ill. 538; *Manufacturers' Accident Indemnity Co. v. Dorgan, supra.*

Judgment of the District Court

The judgment of the District Court, omitting the caption, follows:

An Order for Judgment in favor of the Plaintiff Mary Bell King, for the sum of Five Thousand and no/100 ($5,000.00) Dollars together with interest at the rate of six per cent, from August 25, 1943, and costs, against the Defendant, The Order of United Commercial Travelers of America, having been filed on August 28, 1946, and [fols. 21-22] the interest as directed in said Order for Judgment having been calculated to be the sum of Nine Hundred Sixteen and 66/100 ($916.66) Dollars, and the costs having been taxed in the sum of Twenty-five and no/100 ($25.00) Dollars.

Judgment is hereby entered in favor of the Plaintiff, Mary Bell King, against the Defendant, The Order of United Commercial Travelers of America, for the sum of Five Thousand Nine Hundred Sixteen and 66/100 ($5,916.66) Dollars and costs in the sum of Twenty-five ($25.00) Dollars, a total of Five Thousand Nine Hundred Forty-one and 66/100 ($5,941.66) Dollars.

Signed, sealed and entered this 16th day of September, 1946. W. D. White, Clerk, United States District Court, Western District of South Carolina.

[fol. 23] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

versus

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

November 20, 1946, the transcript of record is filed and the cause docketed.

November 23, 1946, the appearance of F. Dean Rainey is entered for the appellant.

November 25, 1946, the appearance of C. F. Haynsworth, Jr., and C. F. Haynsworth is entered for the appellant.

November 26, 1946, the appearance of Miller C. Foster and Jesse W. Boyd is entered for the appellee.

November 29, 1946, stipulation as to the time to furnish statement under section 3 of rule 10 is filed.

Same day, stipulation to continue case is filed.

ORDER CONTINUING CASE—Filed December 2, 1946

(Style of Court and Title Omitted)

Upon the Stipulation of counsel for the respective parties in the above entitled cause,

It is Ordered that this cause be, and the same is hereby, continued from the January term 1947, of this Court, to the next term thereafter.

November 30, 1946.

John J. Parker, Senior Circuit Judge.

[fol. 24] February 18, 1947, brief and appendix on behalf of the appellant are filed.

March 4, 1947, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

March 13, 1947 (March term, 1947), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 25] OPINION—Filed April 9, 1947

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

versus

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville. Civil Action.

(Argued March 13, 1947. Decided April 9, 1947)

Before Parker, Soper and Dobie, Circuit Judges.

F. Dean Rainey and C. F. Haynsworth, Jr., (Haynsworth & Haynsworth and Rainey & Fant on brief) for Appellant; [fol. 26] and Miller C. Foster and Jesse W. Boyd (Johnson, Johnson & Foster on brief) for Appellee.

DOBIE, Circuit Judge:

The scope of an aviation exclusion clause in a contract of life insurance is the question raised by this appeal. The insured, Lieutenant Drew L. King, a resident of South Carolina, was a flight observer serving with the Civil Air Patrol. He met his death on February 9, 1943, and this suit was instituted by the beneficiary of the policy, the appellee here, against the insurance company, appellant, for the full amount of the policy. The lower court awarded judgment to the plaintiff on stipulated facts. The insurance company has duly appealed.

At eight o'clock in the morning of the day mentioned the insured and a pilot left their base for a routine coastal patrol flight off the shores of North Carolina. The patrol was made in a land based plane along with another plane of like make. About an hour and one-half after take-off, the plane in which the insured was riding developed serious engine trouble. This emergency forced the pilot to bring the plane down at sea some thirty miles from the coast. Apparently the descent was sufficiently controlled to permit

putting the plane on the water in a normal landing position. The men managed to inflate their life jackets and free themselves from the plane before it sank a few minutes later.

There is no question that both men were alive at this time as they were seen to signal the other plane. A subsequent examination confirmed the belief that the men were not [fol. 27] injured by the impact of the plane striking the water. Meanwhile the occupants of the second plane, after dropping an emergency kit, circled the distressed men and tried to establish radio contact with the base. At Noon, which was two and one-half hours later, no help had arrived and the second plane, because of a shortage of gasoline, was forced to return to the base. The men in the water were alive at that time. When a Navy boat finally arrived at two in the afternoon, both men were dead.

A Naval physician (not an eyewitness to the events) issued a statement of death after examining the bodies, which contained the diagnosis: "Drowning as a result of exposure in the water after failure of airplane motor."

The contract of insurance, which the insured had made in South Carolina with the appellant insurance company, contained the following clause:

> "This order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics, (except as a fare paying passenger in a licensed aircraft operated on a regular schedule)."

Although South Carolina law would be controlling, the highest court in that State has never considered the precise question here involved. Accordingly the lower court, in an effort to apply South Carolina law, resorted to some general maxims of insurance law that have been invoked on occasions by South Carolina courts. By stressing particularly the insured's uninjured physical dis-engagement from the airplane, and coupling this with the rule of construction that ambiguous or doubtful clauses must be re- [fol. 28] solved against an insurer, the District Court reached the conclusion that the exclusion clause of the policy was not applicable. We are unable to agree with that conclusion either on reason or authority.

Aside from the many authorities on this question (to which we will advert later in this opinion), we think

the exclusion clause clearly comprehends the very situation that here developed. Any other conclusion must ignore the plain meaning and presence of the word "resulting." To give that word the effect that it must have in everyday speech (and as understood by laymen as well as lawyers) obviates the necessity for technical and artificial rules of construction. In our view of the case it is as undesirable as it is unnecessary to borrow from the law of torts the nuances and subtleties which attend such a phrase as "proximate cause" and to attempt an application of these nuances and subtleties to the facts of the instant case. There is little, if anything, to construe. In undertaking an aerial flight over the ocean in a land-based plane, man must reckon with the perils of the sea which are as imminent and real as the unrelenting force of gravity. Just as flight over the land brings forth the danger of violent collision with the earth, we have the dangers of the sea in over-water flight. That men may remain alive for varying periods of time before succumbling does not change the picture. We think it a rather violent fiction to say that death, under such circumstances, comes from accidental drowning. Common knowledge and experience fairly shout of the dangers of shock, exposure and drowning when a flight is taken over water in the winter time in a land based plane.

Out of the abundance of wisdom that comes with hindsight it might have been better to have also inserted the [fol. 29] words "directly or indirectly" in the exclusion clause. Actually such words were not vital here and would have added little to the force of the word "resulting."

We are asked by counsel for appellee to notice the harrowing experiences and remarkable rescue of Captain Eddie Rickenbacker. The contention is made that when a man leaves a plane under such conditions he is in a position of "potential safety," i. e., he can be saved. To pursue this somewhat ingenious argument is to invert the real question of the case. It is true that rescue, routine or fortuitous, may remove a man from peril. But it does not follow that the failure of rescue brings the peril that causes death. When the insured was in the cold waters of the Atlantic Ocean in February, he was not in a position of "potential safety." He was in imminent peril of death, unless rescue came and also came quickly. We are unable to see how, under these circumstances, death resulted in any way other than from participation in aviation.

There is more than ample authority to support this view. In *Neel* v. *Mutual Life Ins. Co. of N. Y.*, (C. C. A. 2), 131 F. (2d) 159, the insured, after landing his plane on the ocean, was drowned while trying to reach shore. Under a similar aviation exclusion clause, the insurer was held not liable. Judge Augustus Hand, speaking for the Court, said (131 F. (2d) at page 160):

> "The policy provides that Double Indemnity shall not be payable if death resulted 'from participation in aeronautics' and it seems quite contrary to the natural meaning of the proviso to say that Stubbs did not meet his death from 'participation in aeronautics' merely because he may not have been killed by impact upon the water. If he landed in the open sea, even though with- [fol. 30] out immediate injury, drowning was an almost inevitable consequence. To say that his death did not result 'from participation in aeronautics' would exclude from the proviso of the policy the most ordinary risks involved and limit the effect of the clause in an unexpected and unreasonable way. As Judge Cardoza said in *Bird* v. *St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, 120 N. E. 86, 87, 13 A. L. R. 875: 'General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. * * * The same cause producing the same effect may be proximate or remote as the contract of the parties seem to place it in light or shadow. That cause is to be held predominant which they would think of as predominant. A common-sense appraisement of everyday forms of speech and modes of thought must tell us when to stop. It is an act of "judgment as upon a matter of fact."' "

This was followed in *Green* v. *Mutual Benefit Life Ins. Co.*, (C. C. A. 1), 144 F. (2d) 55, in which the insured, a Naval aviator, was forced to land his plane on the water and was drowned while attempting to reach his life raft. Other instructive cases are *Pittman* v. *Lamar Life Insurance Co.*, (C. C. A. 5), 17 F. (2d) 370; *Wendorff* v. *Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S. W. (2d) 99, 57 A. L. R. 615; and *Blonski* v. *Banker's Life Co.*, 209 Wis. 5, 243 N. W.

410. Compare: *Commercial Union Assurance Co.* v. *Pacific Union Club*, (C. C. A. 9), 169 Fed. 776; *Pacific Union Club* v. *Commercial Union Assurance Co.*, 12 Cal. App. 509, 107 Pac. 728; *Tierney* v. *Occidental Life Insurance Co.*, 89 Cal. App. 779, 265 Pac. 400.

[fol. 31] Counsel for the beneficiary virtually conceded in oral argument (as indeed they must) that the *Neel* and *Green* cases, *supra*, are indistinguishable in principle from this case. They rely, however, on *Bull* v. *Sun Life Assurance Co. of Canada*, (C. C. A. 7), 141 F. (2d) 456, *cert. denied*, 323 U. S. 723. In that case the insured went down a few hundred yards from shore, after his plane was damaged by anti-aircraft fire. After the emergency landing, the insured was seen standing on the fuselage, attempting to launch a rubber boat. Other members of the crew, who had already escaped in a rubber raft, dived into the water when a Japanese plane swept low to strafe the crippled American plane. An explosion was heard, the crippled plane burst into flames, and the insured was never seen again. In holding the insurer liable, the Court, by a two to one decision, emphasized the war risk of enemy fire and noted that the jury could have found this intervening force caused death. We agree with the observation in the *Green* case which viewed the intervening force in the *Bull* case as a distinguishing feature. 144 F. (2d) at page 58.

We come, then, to the last argument of the plaintiff (appellee) which is that, irrespective of the foregoing, the South Carolina law would permit recovery in a case of this character. This phase of the argument rests primarily on the *dictum* in *Bolt* v. *Life & Casualty Ins. Co.*, 156 S. C. 117, 152 S. E. 766, 777:

> "* * * our Court has made it the almost universal rule to construe any clause of an insurance policy against the insurer when there existed the least doubt as to the meaning of the language employed."

[fol. 32] We agree that this is an exceedingly broad statement. Nevertheless, in our view of the instant case, the meaning of the language employed in the policy is clear on its face. In any event, we believe that the highest court in South Carolina would not make specific application of such a generalized *dictum*, which, if applied to the facts here, would fly in the face of reason and the very considerable

authority that has expressed the view we now follow. It would certainly not conform with accepted theories of proximate cause. See *Horne* v. *Atlantic Coast Line*, 177 S. C. 461, 181 S. E. 642.

Counsel for appellee, while not contending that we are bound by it, have cited a decision rendered in the Court of Common Pleas for the County of Spartanburg which allowed the same plaintiff to recover on a similar policy with another insurance company on the same statement of facts now before us. That opinion, not binding on other South Carolina courts, is not binding on us and we cannot treat it as a final expression of South Carolina law. *Erie Railroad* v. *Tompkins*, 304 U. S. 64. While we entertain nothing but respect for that court, we must reject its view of this case for the reasons previously expressed. That opinion, it might be added, which was rendered July 29, 1946, relied on the District Court's ruling in the instant case now before us.

The case of *Goethe* v. *New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451, is urged as an instance in which terms in insurance policies should be construed according to the ordinary and usual understanding of its signification by "common people." We are unable to see how this strengthens the plaintiff's case, for our conclusion is [fols. 33-34] reached by the express adoption of the rule urged by plaintiff.

We have carefully considered other cases cited by the plaintiff: *McGee* v. *Globe Indemnity Co.*, 173 S. C. 380, 175 S. E. 849; *Young* v. *Life & Casualty Co.*, 204 S. C. 386, 29 S. E. (2d) 482; *Myers* v. *Ocean Mftg. Co.*, (C. C. A. 4), 99 F. (2d) 485; *Manufacturers Accident Indemnity Co.* v. *Dorgan* (C. C. A. 6), 58 Fed. 945, and find them inapplicable and not controlling.

The judgment of the lower court is reversed.

Reversed.

[fol. 35] JUDGMENT—Filed and Entered April 9, 1947

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

vs.

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of South Carolina, at Greenville, for further proceedings in accordance with the opinion of the Court filed herein.

April 9, 1947.

John J. Parker, Senior Circuit Judge, Morris A. Soper, U. S. Circuit Judge, Armistead M. Dobie, U. S. Circuit Judge.

[fol. 36] May 9, 1947, petition of appellee for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed May 12, 1947

(Style of Court and Title Omitted)

Upon the application of the appellee, by her counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed

pending the application of the Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for the writ of certiorari is filed in the Supreme Court within 30 days from this date.

May 10, 1947.

John J. Parker, Senior Circuit Judge.

[fol. 37] STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1946

No. —

MARY BELL KING, Petitioner,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of the appellant in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the Circuit Court of Appeals for the Fourth Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed [fol. 38] in the Supreme Court of the United States.

May —, 1947.

Jesse W. Boyd, Miller C. Foster, Counsel for Petitioner; C. F. Haynsworth, Jr., F. D. Rainey, Counsel for Respondent.

June 4, 1947, petition for further stay of mandate is filed.

ORDER FURTHER STAYING MANDATE—Filed June 6, 1947.

(Style of Court and Title Omitted)

Upon the application of the appellee, by her counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, further stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for the writ of certiorari is filed in the Supreme Court within 35 days from this date.

June 5th, 1947.

John J. Parker, Senior Circuit Judge.

[fol. 39] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant, and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Ap-

peals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, this 6th day of June, A. D., 1947.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 34] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 35] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed October 31, 1947

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto that, a petition for writ of certiorari having been granted, the printed record for further proceedings may consist of the transcript of record used in connection with the petition for a writ of certiorari.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States.

Jesse W. Boyd, —— ——, [illegible], Attorneys for Petitioner. F. Dean Rainey, C. F. Haynesworth, Jr., Attorneys for Respondents.

October 30th, 1947.

[fol. 36] [File endorsement omitted.]